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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-305

WILLIAM ARVIDSON, ET AL,

Petitioners,

v.

DILLINGHAM CORPORATION, a corporation doing business under the assumed business name of ALBINA ENGINE & MACHINE WORKS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on May 26, 1972.

OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the District of Oregon, issued on February 17, 1970, printed in Appendix "A" hereto,

infra p. 15, has not been reported. The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix "B" hereto, infra, p. 18, has not yet been reported.

JURISDICTION

The District Court has jurisdiction of this cause by virtue of 28 U.S.C.A. 1333(1) and 28 U.S.C.A. 1332; the Court of Appeals has jurisdiction by virtue of 28 U.S.C.A. 1291; the jurisdiction of this Court is invoked under 28 U.S.C.A., § 1254(1).

QUESTIONS PRESENTED

The sole question presented is:

Do shipyard workers, engaged in painting aboard a substantially completed, newly constructed barge then located on navigable waters and then being employees of the barge owner (who was also the shipyard owner) have a direct cause of action against their employer barge owner for negligence under traditional maritime law in failing to provide a safe place to work, notwithstanding the provisions of Section 905 of the Longshoremen's & Harbor Workers' Compensation Act and the receipt of state compensation for their injuries?

STATUTORY PROVISIONS INVOLVED

The sole statutory provision which is relevant to decision of this case, the pertinent text of which is

set forth in Appendix "C" hereto, is Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 905.

STATEMENT

This action was commenced in October of 1969 by the petitioning shipyard workers against Dillingham Corporation, doing business under the assumed business name of Albina Engine & Machine Works for damages for personal injuries sustained by them when volatile paint fumes exploded in the barge on which they were then working. Separate actions were filed by each of the four petitioners; by stipulation, all four actions were consolidated for purposes of determining the issue of liability and for the purposes of the appeal to the Court of Appeals for the Ninth Circuit.

In December of 1969 respondent filed a motion for summary judgment and motion for judgment on the pleadings. After all parties had filed affidavits and briefs, the District Court issued its Memorandum Opinion sustaining respondent's motion for summary judgment on the grounds that the Longshoremen's and Harbor Workers Compensation Act precluded the actions.

The facts involved are as follows:

For a period of months prior to September, 1969, the Dillingham Corporation (herein referred to as the "shipowner-shipyard") was constructing a new

seagoing barge for its exclusive corporate use. The barge was being constructed on Dillingham's marine railway on the East bank of the Willamette River in Portland, Oregon. The lower end of the marine railway projects into the waters of the Willamette River at low water stage. The middle portions and upper end of the marine railway are on dry land at normal stages of water in the river but the bulk of the marine railway is wholly submerged at normal high water.

In early September, 1969, the barge was substantially completed although it had not been launched. On September 8, 1969, the Coast Guard issued a Certificate of Admeasurement, showing the vessel's name as MAKAHANI and its official number as 523399. It was scheduled for launching on September 16, 1969, with final completion set for September 26, 1969. It was intended for use as an unmanned barge and is now being used as an unmanned, seagoing barge.

On September 9, 1969, an explosion and fire occurred aboard the barge caused by ignition of paint fumes while painting was taking place in the double bottom of the barge. Petitioners were painters aboard the barge at the time of the explosion and fire and were injured. Each of the petitioners was a resident of Portland, Oregon, following the trade of painters. Each was a casual hourly employee of respondent Dillingham, and at the time of the explosion, each was engaged in spray painting or mixing of paint for use in spray guns. All four were members of so-called

"shore" unions and were not members of any union recognized as a "seafaring" union.

Petitioners conceded in their briefs and in oral argument that they were not entitled to recovery on a theory of breach of the warranty of seaworthiness. Moreover, petitioners conceded that they had no right of recovery under the Jones Act as the vessel was not "in navigation."

Respondent voluntarily commenced the payment of state Workmen's Compensation benefits to the four injured petitioners and such payments were accepted by the petitioners. No issue of waiver was presented in the appeal to the Court of Appeals with respect to the payment of such benefits by the respondent or the acceptance thereof by the petitioners, and petitioners concede that any recovery in this consolidated action would be offset by the amounts of Workmen's Compensation benefits received by them.

Although a number of subsidiary and collateral questions were briefed and argued before the District Court, the trial judge's ruling was limited to the narrow issue presented in the subsequent appeal. That is, assuming that the barge was a "vessel"; that the petitioners were doing work traditionally that of "seamen"; and that the barge was "on navigable waters," the trial court ruled that the petitioners nevertheless had no cause of action for negligence against the respondent for failing to provide a safe place to work in the light of Section 905 of the Longshoremen's and Harbor Workers' Compensation Act.

Following the memorandum opinion of the District Court, the petitioners appealed to the Court of Appeals for the Ninth Circuit. Thereafter, briefs were submitted and oral arguments presented to that Court. On May 26, 1972, the Court of Appeals issued its opinion affirming the District Court.

The Court of Appeals held that the Longshoremen's and Harbor Workers' Act was designed to provide compensation to employees engaged in maritime employment where recovery through workmen's compensation might not validly be provided by state law. For those employees entitled to compensation, the court stated that the remedy is exclusive under Section 5 of the Longshoremen's and Harbor Workers' Act. Concluding, the opinion of the Court of Appeals provided that where the employer is also a shipowner, Section 5 does not preclude an action for unseaworthiness and that this additional right of recovery should not be extended to an action for negligence.

REASONS FOR GRANTING THE WRIT

I

The decision of the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of the Supreme Court.

The case of *Pope & Talbot, Inc.* v. *Hawn et al*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953) is directly in conflict with the decision in this case. The facts in *Hawn* were as follows: Hawn, a carpenter, employed by Haenn Ship Ceiling and Refitting Cor-

poration, was injured when he fell through an open hatch hole on board one of Pope & Talbot's vessels. He brought an action against Pope & Talbot on the grounds of unseaworthiness and negligence. Pope & Talbot impleaded Haenn as a third party defendant against whom it sought contribution.

The Court in *Hawn* held that since the plaintiff was not a seaman, he was not barred from maintaining a negligence action against the shipowner. The similarity between the facts involved in *Hawn* and this case is evident; both cases involve plaintiffs not employed as crew members but rather as laborers performing repairs while the vessels were not in navigation. The decisions of these two cases are, however, in direct conflict with each other.

When *Hawn* is considered in view of the two additional decisions of *Reed* v. *SS YAKA*, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 448 (1963) and *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731, 87 S. Ct. 1419, 18 L. Ed. 2d 488 (1967), the conflict between this case and applicable decisions of the Supreme Court becomes readily apparent.

In *Yaka*, the plaintiff Reed was employed by Pan Atlantic Steamship Corporation to do longshore work on the SS YAKA. Pan Atlantic was also the bareboat charterer of the vessel. Reed was injured by a defect in a pallet board brought aboard the vessel by Pan Atlantic and used in the loading process. The Supreme Court allowed recovery notwithstanding the express language of Section 5 of the Longshoremen's Act reading:

> "The liability of an employer prescribed in Section 4 shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury or death . . ."

In concluding the *Yaka* decision, the Supreme Court reiterated that the Longshoremen's Act must be liberally construed in conformance with its purpose to help longshoremen and avoid harsh incongruous results. This required consideration of the potential recovery for damages which a longshoreman could recover in a situation in which his employer was an independent contractor rather than a shipowner. The desired objective was found to be that the economic burden in either case should be the same.

Yaka involved an action *in rem*. The question next arose: What about an action *in personam?* This was answered in *Jackson*, involving a longshoreman who sustained fatal injuries while working in the hold of a vessel owned by his employer. His widow filed suit against the employer-shipowner. The Supreme Court, relying on *Yaka*, held that a suit *in personam* did lie.

In summary, *Yaka* and *Jackson* hold that either an action *in rem* or *in personam* is available to a longshoreman against the owner of the vessel upon which he was working when the injury occurred. In both of these cases, the longshoreman recovered under the concept of unseaworthiness, and the Court held that Section 5 of the Longshoremen's Act did not preclude recovery.

When these decisions are combined with the result in *Hawn*, holding that a longshoreman can maintain a negligence action against the shipowner, it becomes apparent that Section 5 of the Longshoremen's Act is not a bar to the petitioners' right of recovery against the respondent in this case. The Court of Appeals for the Ninth Circuit held, however, that "where the employer is also a shipowner, Section 5 does not preclude an action for unseaworthiness, but we find nothing in any of the decisions of the Supreme Court to suggest that this additional right of recovery would be extended to an action for negligence." This decision is clearly not in harmony with prior opinions of the Supreme Court.

II

The decision of the Court of Appeals has decided an important question of federal law which has not been DIRECTLY settled, but should be, by the Supreme Court.

As disclosed in the preceding section of this petition, the Supreme Court has issued prior opinions in other cases dealing with this general area of law. But the particular issue involved in this case has not been *directly* settled by the Supreme Court.

This case differs from the fact situations previously considered by the Supreme Court because the petitioners received benefits under the Oregon Workmen's Compensation Law. It should be pointed out, however, that the petitioners' acceptance of these benefits is not to be construed as an admission that they were entitled to compensation under the Oregon

Workmen's Compensation Law. The Court of Appeals did not decide whether the petitioners were entitled under the Oregon Workmen's Compensation Law or the Longshoremen's and Harbor Workers' Act, pointing out that this would depend on whether the accident occurred "upon navibale waters of the United States," a point not in issue in the appeal.

The Supreme Court has indirectly alluded to the precise question involved in this case, but the specific issue has not been directly settled by this Court. As a result, there is confusion in the various Circuits regarding the question presented in this case. The importance of obtaining a *direct* ruling on this issue becomes readily apparent when one considers the volume of cases involving the longshoreman's right of recovery for injuries sustained while working on a vessel not engaged in navigation.

Concluding, it is necessary to determine, once and for all, whether Section 5 of the Longshoreman's Act is a bar to a longshoreman's right of recovery in an action of negligence against the owner of the vessel.

III

The decision of the Court of Appeals is in conflict, IN PRINCIPLE, with decisions of other Courts of Appeal, and with decisions of this Court.

Decisions arising in other circuits have uniformly sustained the right of shipyard workers, employed by *independent shipyard contractors*, to recover for the negligence of shipowners as an independent ground of

recovery. *Rogers* v. *M/V Ralph Bollinger*, 1968 A.M.C. 1766, 279 F. Supp. 92; *Van Horn* v. *Gulf Atlantic Towing Corp.*, 1968 A.M.C. 946, 388 F.2d 636, reversing 1967 A.M.C. 619; *Price* v. *S.S. Yaracuy*, 378 F.2d 156 (1967). This Court, in *Pope & Talbot* v. *Hawn*, *supra*, upheld the right of a carpenter, employed by an independent ship ceiling company, to recover for his injuries against the shipowner on the grounds of both unseaworthiness *and negligence*, when he fell through an open hatch hole on board one of the shipowner's vessels.

At the same time, pursuing parallel courses, this Court and other circuits have held that shore-based workers may proceed against their employers, if such employers are also the owners of the vessels on which such workers were injured, notwithstanding the provisions of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act. *Reed* v. *S.S. Yaka*, *supra*; *Jackson* v. *Lykes Steamship Co.*, *supra*; *Scopaz* v. *S.S. Santa Luisa*, 372 F.2d 403 (C.A. 2, 1967).

Jackson, coupled with *Hawn*, can leave no doubt that this Court intended to afford these petitioners a right to recover on a negligence theory. *Hawn* and its progeny expressly held that such workers have a right of recovery for negligence. *Jackson* and its progeny expressly held that the availability of a compensation act remedy does not bar an employee of a shipowner-stevedore from a direct admiralty action *in personam*.

Admittedly, if these petitioners had been hired by an independent shipyard and were working on the barge after it was substantially completed and had been "taken over" by the person for whom it had been built, they would have had a right of direct action against the barge owner for negligence. It would be "incongruous, absurd and unjust," merely because the shipyard and the owner of the barge are one and the same, to deny recovery to the petitioners for such negligence. In *principle*, there is no valid distinction between the instant case, on the one hand, and *Hawn* and *Jackson* on the other.

It is also noteworthy, in this connection, that the appeals court below wholly ignored the effect of *Hawn*, even though the main thrust of petitioners' brief in the court below was directed toward the applicability of *Hawn*. The impact and applicability of a highly persuasive case cannot be dismissed by the simple expedient of ignoring it.

CONCLUSION

The Court of Appeals in this case has decided a Federal question in a way which is in conflict with applicable decisions of the Supreme Court and decisions of other Courts of Appeal. The decision of the Court of Appeals has also decided an important question of Federal law which has not been directly settled, but should be, by the Supreme Court in order to eliminate confusion in this particular area of litigation.

For the reasons set forth herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WILLIAM ARVIDSON, Plaintiff, vs. DILLINGHAM CORPORATION, a corporation, doing business under the assumed business name of ALBINA ENGINE & MACHINE WORKS, Defendant.	Civil No. 69-548
JOHN MAC KRISE, Plaintiff, vs. DILLINGHAM CORPORATION, a corporation, doing business under the assumed business name of ALBINA ENGINE & MACHINE WORKS, Defendant.	Civil No. 69-549
RONALD RAINEY, Plaintiff, vs. DILLINGHAM CORPORATION, a corportaion, doing business under the assumed business name of ALBINA ENGINE & MACHINE WORKS, Defendant.	Civil No. 69-552
KINDRICK SIMS, Plaintiff, vs. DILLINGHAM CORPORATION, a corporation, doing business under the assumed business name of ALBINA ENGINE & MACHINE WORKS, Defendant.	Civil No. 69-558 MEMORANDUM OPINION February 17, 1970

GOODWIN, Judge:

Four personal-injury actions have been consolidated for the purpose of determining liability.

The plaintiffs, painters who were injured on a barge which was being constructed for their employer's own use, seek damages for injuries suffered as a result of the employer's negligence. They concede that they cannot recover for unseaworthiness, because the vessel was not in navigation when they sustained their injuries.

The defendant has moved for summary judgment, contending that because the plaintiffs have already been compensated under ORS 656.001 to 656.794, they are barred from further recovery by Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U.S.C. § 903(a):

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workman's compensation proceedings may not validly be provided by State law . . . ."

Notwithstanding plaintiffs' excellent briefs, I have concluded that the Longshoremen's and Harbor Workers' Compensation Act of 1927 does preclude the actions. Moreover, because the actions are not based on unseaworthiness, they are not within the judicial exception of *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946) and its progeny: *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124 (1956); *Reed* v. *The Yaka*, 373

U.S. 410 (1963); and *Jackson* v. *Lykes Steamship Co.*, 386 U.S. 731 (1967).

Consequently, the defendant's motion for a summary judgment is granted and the complaints are dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM ARVIDSON, et al., *Plaintiffs-Appellants,*	)
vs.	)
	) No. 25,951
DILLINGHAM CORPORATION, a corporation doing business under the assumed business name of ALBINA ENGINE & MACHINE WORKS, *Defendant-Appellee.*	)

[May 26, 1972]

On Appeal from the United States District Court for the District of Oregon

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Before: ELY and HUFSTEDLER, Circuit Judges, and JAMESON,* District Judge.

JAMESON, District Judge:

This is an appeal from a summary judgment in favor of defendant-appellee in four separate actions (consolidated for trial) commenced by plaintiffs-appellants, who were painters employed by appellee, for personal injuries suffered in an explosion and fire on a barge which was being constructed by appellee for its own use.[1] Appellee voluntarily commenced the pay-

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* Honorable William J. Jameson, United States Senior District Judge for the District of Montana, sitting by designation.

[1] The barge was being constructed on appellee's marine railway located on the Willamette River in Portland, Oregon. The lower portion of the railway extends into the Willamette

ment of benefits under the Oregon Workmen's Compensation law, Oregon Revised Statutes 656.001 et seq., and the payments were accepted by appellants.[2]

In their complaints appellants alleged both negligence and unseaworthiness. They later conceded that they could not recover for unseaworthiness because the vessel was not in navigation when they sustained their injuries. They contend that they have a direct cause of action against their employer for negligence in failing to furnish them a safe place to work. Appellee contends, and the district court held, that because appellants have been compensated under the Oregon Workmen's Compensation Law[3] they are barred from further recovery by the Longshoremen's and Harbor Workers' Compensation Act.[4] In granting

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at low water while the middle and upper portions are on dry land at normal stages of high water. Like the court below, we assume arguendo that barge was a "vessel" and was "in navigable waters" and the appellants were doing work traditionally that of "seamen."

[2] We do not decide whether appellants were entitled to compensation under the Oregon Workmen's Compensation Law or the Longshoremen's and Harbor Workers Act, 33 U.S.C. § 901 et seq. This would appear to depend on whether the accident occurred "upon navigable waters of the United States," 33 U.S.C. § 903(a), a point not in issue here. See Note 1, supra, and *Victory Carriers, Inc.* v. *Law*, 1971, 404 U.S. 202, 207-8, 92 S. Ct. 418, 30 L. Ed. 2d 383.

[3] Oregon Revised Statute 656.018 provides in part that an employer who satisfies the duty to provide Workmen's Compensation coverage "is relieved of all other liability for compensable injuries to his subject workmen * * *" and the rights of the workman "are in lieu of any remedies they may otherwise have for such injuries against the workman's employer * * *."

[4] The Act provides in pertinent part:

"*Coverage*

"(a) Compensation shall be payable under this

summary judgment the district court concluded:

> "Notwithstanding plaintiffs' excellent briefs, I have concluded that the Longshoremen's and Harbor Workers' Compensation Act of 1927 does preclude the actions. Moreover, because the actions are not based on unseaworthiness, they are not within the judicial exception of *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946) and its progeny: *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124 (1956); *Reed* v. *The Yaka*, 373 U.S. 410 (1963); and *Jackson* v. *Lykes Steamship Co.*, 386 U.S. 731 (1967)."

We agree and affirm.

Appellants argue that the decisions of the Supreme Court in *Reed* v. *The Yaka*, 1963, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448, and *Jackson* v. *Lykes Bros. Steamship Company*, 1967, 386 U.S. 731, 87 S. Ct. 1149, 18 L. Ed. 2d 488, holding that Section 5 of the Longshoremen's Act (33 U.S.C. 905) does not bar an action by an employee against his employer for *unseaworthiness* constitute a "virtual elimination of

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chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." 33 U.S.C. § 903.

"*Exclusiveness of liability.*

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, * * *." 33 U.S.C. § 905.

Section 5" and should be extended to permit an action for the employer's *negligence*.

The Court held in *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, that a shipowner's warranty of seaworthiness extended to a longshoreman injured while loading the ship, even though the longshoreman was employed by an independent contractor. In *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133, an employee of a stevedoring contractor obtained a judgment against a shipowner. The Court held that the contractor must reimburse the shipowner for damages caused by the contractor's breach of its duty to stow the cargo properly and safely. In referring to *Sieracki* and *Ryan*, the Court in *Reed* said in part:

> "But we cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area, like *Sieracki*, *Ryan*, and others, the holdings of which have been left unchanged by Congress. In particular, we pointed out in the *Sieracki* case, which has been consistently followed since, that a shipowner's obligation of seaworthiness cannot be shifted about, limited or escaped by contracts or by the absence of contracts and that the shipowner's obligation is rooted, not in contracts, but in the hazards of the work."

The Court continued:

> "In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ig-

nore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and non-delegable obligation of seaworthiness which it should not be permitted to avoid."[5] 373 U.S. at 414-5.

In *Jackson*, a longshoreman, employed by a shipowner in navigable waters, died from inhalation of noxious gases. His widow sued in Louisiana State court alleging that his death was proximately caused either by the shipowner's negligence in operating the ship or by the ship's unseaworthiness.[6] The Louisiana courts held that the action was barred by § 5 of the Longshoremens' and Harbor Workers' Act, distinguishing *Reed* v. *The Yaka*, supra, on the ground that it involved an action *in rem* and the intervention of a third party. In reversing, the Supreme Court followed *Reed* and held that a longshoreman employed on a ship, whether by an independent contractor or by the shipowner, can recover for the unseaworthiness of the ship.

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[5] The Court concluded that it would produce "a harsh and incongruous result, one out of keeping with the dominant inent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay from a shipowner and others from a stevedoring company doing the ship's service." 373 U.S. at 415.

[6] Appellants stress the fact that in the opening paragraph of the opinion in *Jackson*, the Court refers to the fact that the complaint alleged both negligence and unseaworthiness. This is the only time negligence is mentioned in the opinion, and it is clear that recovery was permitted on the ground of unseaworthiness.

It is conceded that all of the cases in which the Supreme Court has permitted recovery by a longshoreman from his employer were based on a charge of unseaworthiness.[7] Subsequent to *Jackson*, the Court has continued to recognize a clear distinction between liability based on unseaworthiness and liability based on negligence—most recently in *Unser* v. *Luckenbach Overseas Corp.*, 1971, 400 U.S. 494, 498-9, 91 S. Ct. 514, 27 L. Ed. 562,[8] where the Court said:

> "A major burden of the Court's decisions spelling out the nature and scope of the cause of action for unseaworthiness has been insistence upon the point that it is a remedy separate from, independent of, and additional to other claims against the shipowner, whether created by statute or under general maritime law. More specifically, the Court has repeatedly taken pains to

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[7] Under different factual situations, a number of courts have rejected the contention, asserted by appellant, that the holding in *Jackson* should be extended to permit recovery for negligence from an employer under the Longshoremen's and Harbor Workers' Compensation Act and other acts making compensation under the act the exclusive remedy against the employer. See, e.g., *Atkins v. Greenville Ship Building Corp.*, 5 Cir. 1969, 411 F.2d 279 cert. denied 396 U.S. 846; *Vantrease* v. *United States*, 5 Cir. 1968, 400 F.2d 853; *Storey* v. *Garrett Corporation*, C.D. Cal. 1967, 43 F.R.D. 301; *Miller* v. *United States*, E.D. Va. 1969, 307 F. Supp. 932.

[8] In *Unser* a longshoreman employed by an independent contractor sought damage for injuries allegedly caused by the ship's unseaworthiness. The Court held that an "isolated, personal act of negligence of petitioner's fellow longshoreman" would not permit recovery for unseaworthiness. It was recognized that petitioner was covered fully under the Longshoremen's and Harbor Worker's Compensation Act. 400 U.S. at 498, n. 10. While the Court did not consider the question presented here, since petitioner did not seek recovery for negligence, the Court's clear recognition of the "complete divorcement" of the concepts of unseaworthiness and negligence is pertinent.

point out that liability based upon unseaworthiness is wholly distinct from liability based upon negligence. The reason, of course, is that unseaworthiness is a *condition*, and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it.

"We had occasion to emphasize this basic distinction again in *Mitchell* v. *Trawler Racer*, 362 U.S. 539, * * * What has evolved in our case law, we said, is the 'complete divorcement of unseaworthiness liability from concepts of negligence.' 362 U.S. at 550."

Thus the Court in emphasizing the basic distinction between unseaworthiness and concepts of negligence has recognized that a shipowner is charged "with the traditional, absolute, and non-delegable obligation of seaworthiness" (*Reed*), and that a cause of action based on unseaworthiness is "a remedy separate from, independent of, and additional to other claims against the shipowner, whether created by statute or under general maritime law (*Unser*)." There is no parallel in the area of maritime negligence. There is no absolute or nondelegable obligation on the part of the employer and no additional or independent cause of action.

The Longshoremen's and Harbor Workers' Act was designed to provide compensation to employees engaged in maritime employment where recovery through workmen's compensation might not validly be provided by the state law. *Nogueria* v. *N.Y., N.H.*

& H.R. Co., 1930, 281 U.S. 128, 131, 50 S. Ct. 303, 74 L. Ed. 754. For those employees entitled to compensation, the remedy is exclusive under Section 5. *South Chicago* v. *Bassett*, 1940, 309 U.S. 251, 256, 60 S. Ct. 544, 84 L. Ed. 732.[9] Where the employer is also a shipowner, Section 5 does not preclude an action for unseaworthiness, but we find nothing in any of the decisions of the Supreme Court to suggest that this additional right of recovery would be extended to an action for negligence.

[9] See also *Moragne* v. *States Marine Lines, Inc.*, 1970, 398 U.S. 375, 394, n. 11, 90 S. Ct. 1772, 26 L. Ed. 2d 339.

Affirmed.

APPENDIX C

Title 33, U.S.C. Section 905:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

SEP 21 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court
of the United States

OCTOBER TERM, 1972

No. 72-305

WILLIAM ARVIDSON, et al,

Petitioners,

v.

DILLINGHAM CORPORATION, a corporation doing business under the assumed business name of ALBINA ENGINE & MACHINE WORKS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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I

OPINIONS BELOW

The opinion of the District Court (App. A of Petition) has not been reported. The opinion of the Court of Appeals for the Ninth Circuit (App. B of Petition) also has not yet been reported.

II

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III

QUESTION PRESENTED

Whether shipyard workers, injured while painting a new partially constructed barge owned by the shipyard, can sue their employer-bargeowner for negligence in failing to provide a safe place to work, notwithstanding their receipt of compensation from their employer under the State Workmen's Compensation Act.

IV

STATUTES INVOLVED

Petitioners have received compensation payments under the Oregon Workmen's Compensation Act, ORS 656.001 et seq. The only provisions of that statute here pertinent are ORS 656.018(1) and (2) which provide in part:

> "(1) Every employer who satisfies the duty required by subsection (1) of ORS 656.016 [the duty to provide workmen's compensation coverage] is relieved of all other liability for compensable injuries to his subject workmen, the workmen's beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such injuries....

"(2) The rights given to a subject workman and his beneficiaries for compensable injuries under ORS 656.001 to 656.794 are in lieu of any remedies they may otherwise have for such injuries against the workman's employer under ORS 654-.305 to 654.335 or other laws, common law or statute . . . ."

Petitioners have never received any benefits under the federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. However, Section 5 of that Act, 33 U.S.C. § 905, contains an "exclusive liability" provision analogous to that in the Oregon law, and the effect of that Section is treated in the admiralty cases here pertinent. Section 5 provides in part:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

V

STATEMENT

Respondent accepts the statement of the case as set forth in the Petition, with the exception of the references to "marine railway" at Page 4 of the Petition. The way upon which respondent's barge was being constructed when the injury occurred was not a "marine railway" but only a "launching way" used in the construction of new vessels.

VI

ARGUMENT

The Ninth Circuit's Ruling Does Not Conflict with Applicable Supreme Court Decisions But, on the Contrary, is in Complete Harmony with Those Decisions.

The sole issue in this case is whether shipyard workers injured while painting a new partially completed barge owned by the shipyard can sue their employer-barge owner for negligence, notwithstanding their receipt of compensation from their employer under the State Workmen's Compensation Act.

No United States Supreme Court case has ever so held. Petitioners' position, unique in admiralty law, that a direct negligence action does lie against the employer is therefore based on a tortured construction of three Supreme Court decisions: *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), *Reed* v. *S.S. YAKA*, 373 U.S. 410 (1963), and *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967). None of those

cases, taken separately or together, offer any support for petitioners' strained contention.

Pope & Talbot, Inc. v. *Hawn* allowed a negligence action by a carpenter, employed by an independent contractor, against a *third party ship owner*. This has always been the law. See cases cited in *Hawn*, 346 U.S. at 413-14, n. 6. Such a decision is, however, irrelevant to the case at bar, where employees are directly suing their *employer* for alleged negligence, even though they have been compensated by the employer under the State Workmen's Compensation Act.

Reed v. *S.S. YAKA* held that a bareboat charterer owed a warranty of seaworthiness to a longshoreman employed by the charterer, even though another company was the title owner of the ship. The Court treated the charterer as the owner of the vessel *pro hac vice:*

> "... [O]nly blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and non-delegable obligation of seaworthiness which it should not be permitted to avoid. ..." 373 U.S. at 415.

Using this rationale, the Court also held that the "exclusive liability" provision of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (which is analogous to that found in the Oregon Act here involved), did not prevent the

employee from suing his employer for *unseaworthiness*, because the employer was also the *owner* of the vessel. The Court in so deciding thus rejected the contention that "petitioner must be completely denied the traditional and basic protection of the warranty of seaworthiness simply because Pan-Atlantic was not only the owner *pro hac vice* of the ship but was also petitioner's employer." 373 U.S. at 414.

Jackson v. *Lykes Bros. Steamship Co.* followed *Reed* and held that a longshoreman employed on a ship, whether by an independent contractor or by the shipowner, can recover against the shipowner for *unseaworthiness*, notwithstanding Section 5 of the Longshoremen's Act.

Reed and *Jackson* held, therefore, that an employee can sue a shipowner for its breach of *warranty of seaworthiness* even though the shipowner was also the employer and had compensated the employee under the applicable compensation act. But the fact that Section 5 does not prevent an employee from suing an employer-shipowner for unseaworthiness in no way supports petitioners' contention that he could sue for negligence, as unseaworthiness and negligence are two entirely distinct concepts. The distinction between unseaworthiness and negligence was emphasized in the Ninth Circuit's opinion. Quoting from *Unser* v. *Luckenbach Overseas Corp.*, 400 U.S. 494, 498 (1971), the Court of Appeals stated:

> ". . . [T]he Court has repeatedly taken pains to point out that liability based upon unseaworth-

iness is wholly distinct from liability based upon negligence. The reason, of course, is that unseaworthiness is a *condition*, and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it." (App. B of Petition, pp. 23-24).

This fundamental difference is manifested in the purpose behind the state and federal compensation statutes. Those statutes were designed not to protect shipowners from unseaworthiness suits, but to protect employers from negligence actions brought by their employees. The Oregon Workmen's Compensation Act, ORS 656.001 et seq., was enacted to *replace* the employer's common law liability to employees for *negligence*, and in its stead provided the employee an exclusive remedy of compensation without regard to employer negligence. *See, e.g., Johnson* v. *Timber Structures, Inc.*, 203 Or. 670, 678, 281 P.2d 723 (1955). The same is true of the federal Longshoremen's Compensation Act, through which Congress displaced the longshoremen's right to sue their employer for negligence. *Pope & Talbot, Inc.* v. *Hawn, supra*, 346 U.S. at 415 (concurring opinion of Mr. Justice Frankfurter). To accept the petitioners' argument in the instant case and allow employee negligence actions against the employer would be tantamount to repealing the federal and state compensation acts which were enacted to protect the employer from such suits for reasons of public policy. Any such repeal should be the job of the legislature, not the Supreme Court.

The Ninth Circuit, in affirming the District Court's granting of defendant's motion for summary judgment, followed the pertinent decisions of this Court. Indeed, for the Court of Appeals to have held otherwise would have been a severe departure from these decisions. In such a case the grant of a *writ of certiorari* would be warranted to remedy such a complete departure from the existing law. However, the Court of Appeals, after carefully applying the *Reed* and *Jackson* cases, in fact concluded its opinion as follows:

> "Where the employer is also a shipowner, Section 5 does not preclude an action for unseaworthiness, but we find nothing in any of the decisions of the Supreme Court to suggest that this additional right of recovery would be extended to an action for negligence."

This is correct. The right of an employee receiving compensation to sue his employer for direct negligence was not even at issue in *Hawn*, *Reed* or *Jackson*, much less recognized. Petitioners' argument that those cases established such a right, while necessarily imaginative, is completely unfounded in law. There is nothing in any Supreme Court decision to support petitioners' argument, and petitioners' desperate interpretations of *Hawn*, *Reed* and *Jackson* are of no avail. There is absolutely no conflict with Supreme Court decisions, and the petition must be denied.

B

The Ninth Circuit's Decision Does Not Conflict in Principle with Decisions of This Court or of Other Courts of Appeal.

Petitioners correctly state that other circuits have uniformly sustained the right of shipyard workers employed by independent contractors to recover for the negligence of shipowners as an independent ground of recovery. This was also the result in *Pope & Talbot* v. *Hawn, supra.* Petitioners also state (citing *Reed* and *Jackson,* both *supra*) that "this Court and other circuits have held that shore-based workers may proceed against their employers, if such employers are also the owners of the vessels on which such workers were injured, notwithstanding the provisions of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act." (Petition, p. 11). Petitioners then make the same fallacious argument as before, that *Jackson* coupled with *Hawn* "can leave no doubt that this Court intended to afford these petitioners a right to recover on a negligence theory" (*Id.*). They claim that "in principle" there is no valid distinction between this case and *Hawn* and *Jackson,* since they would admittedly have a right to sue the shipowner for negligence if they had been hired by an independent shipyard.

Again, this argument fails to recognize the realities of the situation. True enough, *Hawn* did allow a carpenter to sue an independent third party shipowner for negligence, and *Reed* and *Jackson* did allow long-

shoremen to sue their employer-shipowners notwithstanding the "exclusive liability" provisions of Section 5. However, petitioners conveniently de-emphasize the facts that in *Hawn*, unlike here, the negligence suit was not against the petitioner's employer, and that the additional remedy allowed in *Reed* and *Jackson* was for breach of warranty of seaworthiness, not for negligence. Petitioners completely misunderstand, or wilfully disregard, the fundamental differences between shipowner and employer on the one hand, and unseaworthiness and negligence on the other, which are, of course, the crucial factors distinguishing this case from *Hawn*, *Reed* and *Jackson*. Were petitioners suing respondent for breach of a *shipowner's* warranty of seaworthiness, Section 5 would be no bar; however, they are seeking to sue respondent as an *employer* (not as an independent third party as in *Hawn*) for negligence in failing to provide a safe place to work. As such they are precluded by Section 5. This is only logical, because, as mentioned, the state and federal compensation acts were enacted for the very purpose of protecting employers from negligence actions by their employees. For this Court to accept the petitioners' argument would be to repeal those statutes by judicial action.

That the above analysis is well founded in reason is evidenced by the complete uniformity of decisions dealing with the subject, all of which have correctly read *Jackson* as applying solely to employee *unseaworthiness* claims. *Manning* v. *M/V SEA ROAD*, 417 F.2d 603 (5th Cir. 1969); *Atkins* v. *Greenville Ship*

Building Corp., 411 F.2d 299 (5th Cir. 1969); *Vantrease* v. *United States*, 400 F.2d 853 (5th Cir. 1968); *Miller* v. *United States*, 307 F. Supp. 932 (E.D. Va. 1969); *Storey* v. *Garrett Corp.*, 43 F.R.D. 301 (C.D. Cal. 1967).

In short, there is no conflict whatsoever between the instant decision and those of the Supreme Court or of other circuits, either in fact or in "principle." On the contrary, there is complete unanimity among the courts in the rejection of petitioners' contention. There is no dispute or confusion between the circuits; there is no federal question requiring clarification; there is no need for direct adjudication by the Supreme Court. The petition must be denied.

VII

CONCLUSION

Petitioners, having received workmen's compensation benefits under the Oregon Workmen's Compensation system, seek to overturn the statutory protection given to employers against direct negligence actions by their employees. Petitioners are unable to cite any authority granting them this remedy, nor can they create such a remedy by far-reaching interpretations and strained extrapolations from existing Supreme Court decisions. All the pertinent cases uniformly reject petitioners' attempt to judicially repeal the statutory protection scheme. The Ninth Circuit adhered to this position, and in so doing has preserved the unanimity among the courts regarding the issue

here presented. The petition for writ of certiorari should be denied.

Respectfully submitted this 22nd day of September, 1972.

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